

# GOVERNMENT . RATE-MAKING

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## Government Rate-Making

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MR. PRESIDENT AND GENTLEMEN OF THE UNION LEAGUE CLUB:

Questions of human conduct have from the dawn of civilization occupied the minds of thinkers, of students, and of lawmakers. What policies should be prescribed and enforced in respect to the relations which men bear to each other has always been a difficult, sometimes an insoluble, problem. As society grows more complex and artificial, the difficulties increase, while at the same time the demand for their solution becomes more imperative and inexorable. The discussion to-night of one phase of the problem will, I hope, help us a little forward, or at least not retard the steps of those who are honestly trying to reach the truth, so far as we can discern the truth in the bewildering mass of facts and conditions which surround us.

There is nothing more alluring to the well-intentioned mind of a patriotic citizen than to be shown a wrong, real or imaginary, and a remedy, made to order or kept in stock, in that great factory which gives its annual output to all who seek, to all who need, and to all who think they need.

Briefly stated, the questions now uppermost are:

"Ought the railway systems of the country to be turned over to the control and management of seven gentlemen, not themselves interested in or familiar with railway management?"

"Is it likely that they would take a wiser view of commercial necessities, of the elements which make for prosperity in towns, and communities, and regions, than men who have something at stake, who have been trained in the school of transportation, and who are actively striving to upbuild the lines which they represent, and the communities which they must needs serve, or go out of business?"

Knowing how much self-interest has to do with all human effort, how little is accomplished without it, and how it enters into governmental affairs, departments, bureaus, commissions, and the entire mechanism of administration, it is pleasant to read the words of a by-gone statesman, who put the common-sense views of a great reflective mind into a single sentence, pregnant with meaning for those who care to know:

“General interests are never advanced except by the efforts of those who represent special interests.”

All experience shows how true this is. The marvelous progress, the unparalleled growth of the United States, has not been the result of government by commissions and bureaus, but of the action and counteraction of commercial forces which, under economic laws, have worked out, and always will work out, the true solution of such problems as we are now dealing with. No government in the world is like ours. None is so complicated, so artificial, and, in a certain sense, so “metaphysical.” It is a dual entity. In their spheres, that is, within their constitutional limitations, the States and the nation are disconnected, legally separated, and each independent of the other. The regulation of commerce, now under discussion, is national—that is to say, interstate—and has no constitutional or legal relation to State control. But it has a practical relation, generally forgotten by those who advocate an increase in the powers of the Interstate Commerce Commission. Each State may, and does, regulate its own domestic commerce, but the commerce which makes this the greatest financial and industrial power in the world is not the local commerce of the States. The products of Iowa, and Wisconsin, and Illinois do not remain in those States, but flow outward to the sea and to foreign lands beyond the sea. Thus we have two sets of regulations, the regulation by each State and the regulation by the United States. The lines of my company—the Chicago, Milwaukee & St. Paul—extend through or into eight different States, each with the power of regulation and each free to regulate without regard to the others. Within the boundaries of each State the

railway is subject to its local law as to local traffic, and thus it happens that what is legally right in one State may, and often does, become legally wrong in another. But above and beyond these local regulations is the sweeping power of the general Government regulating the commerce of the country, more than 80 per cent of which is interstate. Our nation is doubtless fortunate in having so large a number of statesmen who know exactly what should be done, and are willing to undertake the task of doing it—the men who decide without thought, and must so decide if they decide at all. But, gentlemen, it is not by denunciation, nor by the declamation of amateur statesmen, that great questions of governmental policy are to be determined. It is conceivable that men may differ without being dishonest, and that a man is not necessarily a rascal because he does not agree with another on an economic or commercial question.

I believe that the rate-making power, if vested in the Interstate Commerce Commission, would be absolutely destructive of commercial prosperity in this country. It would mean disaster to the railways, and still more to the business interests of the country. I mean no disrespect to the Interstate Commerce Commission as now constituted, or as it may hereafter be constituted, but I take the liberty of saying, in this free forum of public discussion, that neither by training, by education, nor by experience, are they fitted or will they be fitted to wield such tremendous power. If one of the members of that body deems it proper to urge that additional powers be given to the commission of which he is a member, it is idle to talk of constitutional liberty if every mouth but his shall be closed. I therefore feel entirely free to speak my mind both as a citizen of the United States and as the representative of interests vitally affected. If Chief Justice Fuller, or any member of the Supreme Court, should appear here, or in Boston, or publicly anywhere, insisting that additional powers or jurisdiction should be given that court, men might differ as to the merits of the question; but they would not differ as to the propriety of the act.

Stripped of its non-essentials, what is the question presented to-night? Is it rebates, or discriminations? No. Confessedly, they are things of the past, and, besides, the recent bill and the agitation of the rate question involve only the question of *making rates*. But it is easy to talk of rebates, when nobody is asking for legislation against rebates; it is easy to talk of an obsolete and abandoned evil as if it still stalked abroad. It is dead, and now that it has gone to its long home I take the liberty of saying, what every member of the Interstate Commerce Commission knows, the railways were never wholly responsible for it. They were not paying out money because they wanted to. The chairman of the Interstate Commerce Commission in 1903 stated to a committee of the Senate that rebates had practically ceased to exist, and it is within the common knowledge of shippers and of the railways that rebates are no longer paid. Bear in mind, giving preference to one shipper over another is not illegal at common law. Competition is the one thing favored, and competition never gave equal advantages to all. The anomaly of the present situation is that the law requires competition and prohibits the steps necessary to secure it. It has been well said that if railways compete they are seized by the Interstate Commerce law—if they do not compete they fall into the hands of the anti-trust law. The *reductio ad absurdum* is: That therefore the Interstate Commerce Commission should make rates.

But, suppose all the interstate rates in the United States should be made by the Interstate Commerce Commission, would that fact have the slightest effect in repressing rebates? Is it not as easy to pay a rebate under a tariff made by the Interstate Commerce Commission as when made by the officials of the railway? Every sensible man who has had any experience in transportation knows perfectly well that it would be as easy, perhaps easier, to cut rates by means of rebates and other devices when the tariff schedules are made by a commission. And yet the advocates of conferring the rate-making power upon the Interstate Commerce Commission

never cease talking about rebates, as if rates made by a commission could not be cut with as little difficulty as are rates made by traffic officials themselves. The question of rebates never had the slightest relation to the question whether the commission should have the power to make rates.

#### GOVERNMENT REGULATION.

Nobody denies the right of the Federal Government to regulate interstate commerce. It is given by the Constitution; it has been exercised, and it has been sustained by the courts. I do not think anyone now believes that the granted power to regulate commerce was *intended* to be the power now exercised, much less the power now demanded. But it is probably too late to question the right of Congress to make rules and regulations governing commerce among the States. One would think that men would hesitate to ask for the additional authority now demanded, coupled as it is with such tremendous responsibilities. But the lust for power is inherent in human nature, and so it happens that the commission, already burdened by a weight of official duties, asks for more. Not content with supervising all the operations of the railroads, not satisfied with the power to decide upon the reasonableness of an existing rate, they ask power to fix rates for the future.

#### THE COMBINATION OF POWERS.

1. The power to determine the reasonableness of an existing rate is purely judicial.
2. The power to fix a rate for the future is purely legislative.
3. The power to prosecute and send out secret-service agents is purely executive.

Thus we have in the Interstate Commerce Commission, and in the commission proposed by the Esch-Townsend bill, a consolidation of the three great organic powers established by the Constitution—legislative, judicial, and executive.

I do not now discuss the question whether all these powers

*can* be constitutionally vested in one tribunal; the important question is, whether they *ought* to be. Should the prosecutor in a civilized government be also the judge and to some extent the executioner? That is precisely the power the Interstate Commerce Commission assumes and seeks to have strengthened and enlarged. It prosecutes cases; it decides cases; it appeals cases and appears from term to term as a litigant in the courts of the United States. It is an illogical system, not adapted to the securing of justice but skillfully contrived to prevent it. Statesmen and publicists the world over have praised the American Constitution because its framers had the wisdom to separate the three great organic powers of government, and to ordain their perpetual maintenance in co-ordinate independence. If the legislation now being urged upon the American people does not absolutely violate the Constitution it shows a disregard of the regular and orderly administration of the different powers of government.

#### THE DIFFERENCE BETWEEN RATES MADE BY A RAILWAY COMPANY AND RATES MADE BY A COMMISSION.

It is proposed that rates shall be made—or *may* be made, which is practically the same thing—by a commission. Grant, if you please—though it is hardly possible—that the commission will be composed of men who understand the railroad business. What will they do? How will they make rates? Will they consider “A” when they make a rate for “B”? Of course they should not consider simply the road on which they are making the rate, for they are public servants, sworn to do their duty as such, and all the people are entitled to their care. A general freight agent looks after his own road, but the commission is sworn to look after all roads. Ought a commissioner, with his oath registered—in the proper place—to have the power to make a rate which though fair upon one road may yet ruin another? He has no interest in the road over which he makes the rate, but he is under oath to be “everybody’s friend.” While making a rate,

say between Kansas City and Chicago over the Atchison, he ought to consider the effect that the rate will have upon the Rock Island, Burlington, and other roads connecting these two cities, but under the limitations of the law giving him the rate-making power he can do nothing of the kind. Suppose he makes a rate from "A" to "B" what will become of "C," "D," and "E"? As a Government official he can not swerve, he can have no feeling, no sympathy, but only that blind sense of duty which says, and must say, "let the law take its course."

The whole scheme of Government rate-making is destructive of individual enterprise. It breaks down where it should build up. It destroys where it should encourage. If there be one thing more than another that has developed this nation it is the unrestricted play of individual effort. It is hateful to the genius of a free people to have the repressive hand of governmental control laid upon them, measuring out the length and breadth of their doings and their operations. Regulation is one thing—destruction is another.

Undoubtedly the power to make rates, in the hands of the railways, is a great power, and capable, if unrestrained, of large excesses. Practically, as everybody knows, it is restrained, and kept in subjection by competition which to-day exists substantially everywhere. A distinguished member of the Interstate Commerce Commission, who is with us to-night, said in a recent speech before a club in Boston:

"It is sometimes declared that these railway magnates can impose upon this country whatever freight rates they choose. No statement could be more ridiculous. Competitive transportation and commercial conditions fix and absolutely limit the freight rate which could be imposed in many instances if a single individual owned and controlled every railway in the United States. When grain is once at Chicago or Duluth the water determines the rate to the seaboard."

Here, then, we have unimpeachable testimony that competition and commercial conditions are the great factors which enter into rate-making by carriers themselves at the

present time; but, the carriers, looking, as they are bound to look, to the widely diversified interests they serve, can not forget how all rates are inter-related, and how much each is affected by the others. The very reverse of this is the condition which would arise if rates were made by a government commission upon the inflexible basis of a statutory enactment. Curiously enough, the member of the Interstate Commerce Commission from whom I have had the honor to quote, and who insisted that "the statement that the railway magnates can impose whatever freight rate they choose is ridiculous," and that "competitive transportation and commercial conditions fix and absolutely limit the freight rate," used the following language in the same speech, if he is quoted correctly:

"But it is asserted that the railway rate is determined by the laws of trade and commerce. This statement I utterly deny. The railway rate is not a commodity whose price is determined by the law of supply and demand; it is in this country to-day a tax resting in most cases on the judgment of the man who imposes it."

A rate for service rendered by a railway, or by anybody else, is in no true sense a tax. One might as well say that the wages paid a coachman is a tax, or that the bill which comes from a merchant for household purchases is a tax. A tax is a burden levied upon all by the Government for benefits presumed to have been received, but levied equally upon those who are and those who are not benefited. If the power to make rates is the power to tax, then it is, as Chief Justice Marshall has said, the power to destroy, and I do not believe the people of this country are ready to vest that power in seven men.

But the gentlemen who demand that the rate-making power be vested in a commission do not seem to comprehend the sort of power they are invoking. The power to make rates for carriage of articles of interstate traffic, if granted at all, is granted as a regulation of commerce. But where does the power begin and where does it end? It begins with the buying and ends with the selling. If Congress can fix

the price of a mere incident of commerce—the carriage—can it not regulate the main elements—the buying and selling price? It has not done so, but why may it not, if it can fix the price of carriage between the buyer and the seller? Would the business men of Chicago be willing to have their purchases of commodities for interstate shipment regulated by a commission? If Congress or a commission created by Congress fixes the price of hauling articles of interstate traffic, is there any reason why it should not fix the compensation of brokers employed in such traffic? There is none. If the power to fix rates for the carriage of interstate commerce exists—which I do not now deny—no reasonable argument can be made against the right of Congress to fix buying and selling prices, brokerage, and all charges connected with the traffic, from the producer to the consumer. If Congress can vest in a commission the power to make rates—that is to say, to determine the earnings of a railway company—under the guise of regulating commerce, is it not clear that it may, and indeed ought, to regulate the operating expenses, including the wages to be paid? Fixing the income is only one-half the regulating power—fixing the outgo is the other. Remember, it is not merely because railroads are public-service corporations that Congress exercises the power of regulation, but because they carry interstate traffic. In other words, the power of making rates is exercised not over the corporation, but over the commodities it carries. A State may control its own corporations because it has created them and has visitatorial power over them. But Congress can control such corporations only by virtue of its right to regulate the commerce they carry. Let every merchant and every broker here to-night, and every business man who buys or sells in other States than Illinois, understand that the congressional power to make rates on interstate traffic logically carries with it the power to regulate buying, selling, and brokerage, for these are all parts of the commerce which Congress is empowered to regulate.

## THE PRACTICAL DIFFICULTIES OF RATE-MAKING BY GOVERNMENT COMMISSION.

When a State, through its legislature or through a commission provided by legislative enactment, establishes a rate on the transportation of traffic within that State, it is exercising a familiar power of sovereignty—a power very different from that which the general Government exercises in the regulation of interstate commerce. The States may exercise any sovereign power which they have not surrendered to the Federal Government, while the Federal Government can exercise only such powers as are granted by the Constitution. One of the powers granted by the Constitution to Congress is in the following language:

“Congress shall have power to regulate commerce with foreign nations and among the several States, and with the Indian tribes.”

It is to this grant of power that Congress must look for authority to pass any act regulating interstate commerce. There is, however, another provision of the Constitution, which is a limitation upon the provision just quoted. They must be considered together in determining just what power Congress possesses, or may confer upon a commission created by it. It is found in Article 1 of the Constitution of the United States, in clause 6 of section 9, and is as follows:

“No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another.”

Historically speaking, this provision was perhaps regarded as more important than the one upon which it is a limitation, and it has been asserted, and no doubt correctly, that but for the insertion of this provision the Constitution could not have been adopted. And it is clear from the debates in the constitutional convention that the grant of power to Congress to regulate commerce among the States could never have been adopted but for the limitation against giving any preference to the ports of one State over those of another. It is well

understood by historical students that the convention which framed the Constitution was called by the efforts of patriotic statesmen, who felt that the disputes between the different States upon matters of trade and commerce seriously threatened the disruption of the existing confederation.

Gentlemen who discuss the grant of power to Congress to regulate commerce among the States seem to forget that it is not an unlimited grant. The hands of Congress, and the hands of any commission created by Congress, are stayed when they attempt by any regulation of commerce to give a preference to the ports of one State over those of another.

A commission can certainly have no greater power than Congress itself possesses. If Congress can not by any regulation of commerce enacted by itself give a preference to the ports of one State over another, it clearly follows that the Interstate Commerce Commission can not do so. If the Interstate Commerce Commission establishes a rate, it thereby regulates commerce, for otherwise it would have no power to establish the rate. It is only as a regulation of commerce that it can be permitted to make a rate at all.

The commission, in establishing rates to the Atlantic seaboard, to the Gulf seaboard, or to the Pacific seaboard, must not and can not give a preference to the ports of one State over those of another. But the term "port" is not confined to towns or cities located upon the sea. There are numerous ports in the United States on the Great Lakes and on navigable rivers which come within the constitutional provision. And it is probable that the term "port," as now understood in the laws of the United States, brings within this constitutional provision a large number of places not situated upon any waters at all. When the Constitution was adopted, Chicago did not exist even in the dreams of the statesmen of that period. And yet Chicago is in some respects the most important port in the United States. In 1892, Mr. Justice Field of the Supreme Court of the United States, in the Illinois Central Lake Front case, said:

“The arrival and clearings of vessels at the port of Chicago exceed in number those of New York, and are equal to those of New York and Boston combined.”

If the power to make rates is conferred upon the Interstate Commerce Commission, that body will be immediately confronted with the responsibility of making rates to and from every port of the United States. If it makes a rate to or from Philadelphia in the State of Pennsylvania, it must not give any preference to that port over Baltimore in the State of Maryland, or any of the numerous ports upon the Atlantic seaboard with which Philadelphia is in competition. More than this, no rate established by the commission to or from any port of the United States in the East, the South, the West, or elsewhere can be permitted to give a preference to the ports of one State over those of another.

What is the practical lesson arising from this provision of the Constitution? Plainly it is this: That the framers of the Constitution did not intend that Congress or any commission created by Congress should establish rates for the carriage of interstate commerce to or from the ports of the United States. This is plain because it must have been apparent to them, as it is to us now, that it is not possible to make rates which do not give a preference unless they are absolutely upon a distance basis. But if rates were made by the commission, or by Congress itself, upon a distance basis, while the Constitution might not be violated, the commerce of the country would be hopelessly wrecked.

Traffic officials, each representing his own line, have, as they rightfully could, made such rates as would secure to each line a reasonable proportion of traffic, thereby giving to the public the competition which a distance tariff would destroy. Aside from the constitutional provision, the inherent vice of rates established by direct legislation, or by orders of commissions created by legislation, is that all such rates must be based upon mere distance. The inevitable result of distance tariffs—and it is a result open and notorious in the knowledge of all business men—is that each town,

city, port, and each manufacturing or commercial center, is subjected to the disadvantages which may arise from its mere geographical location. Take for illustration the great Middle West—the heart of the continent and the seat of its greatest and most rapidly developing agricultural, commercial, and industrial prosperity—what would be the effect of the establishment of transportation rates by distance alone upon this great region? Omaha and Kansas City, which are the gathering places for the products of the great States of Nebraska and Kansas, are to-day enjoying competitive rates to the Gulf of Mexico and to the Atlantic seaboard, although each is several hundred miles nearer the Gulf than the Atlantic seacoast.

It is not the fostering care of a paternal government which gives these great producing areas the benefit of this competition, but the enlightened selfishness of transportation corporations struggling for the business, which is only obtainable by competition untrammelled by legislative interference.

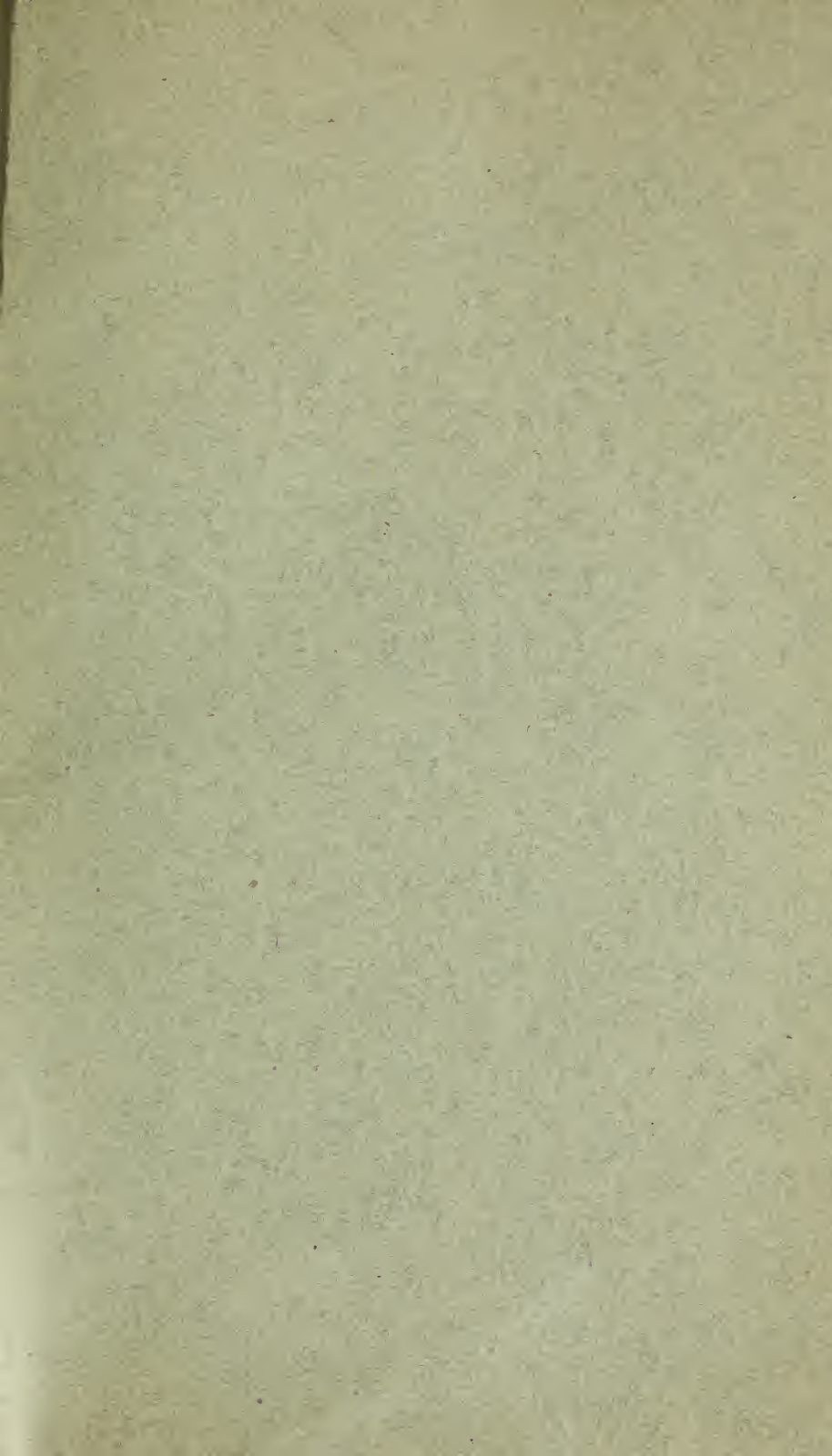
What would become of this competition between the Gulf and the Atlantic seaboard, if the rate-making power were in the hands of a commission, bound by the limitations of the constitutional provision against preferences to the ports of one State over those of another? If the commission should declare that the railways must carry 1,600 miles to New York at the same rate for which they carry 1,200 miles to Galveston, that would undeniably be a preference of New York over Galveston, and it would be as clearly and undeniably a violation of the Constitution. Every port and commercial center in the United States, and every region which ships to or from such ports and centers, is directly and vitally interested in this question. This objection to Government rate-making is so fundamental that the first rate made by the commission would inevitably be challenged by some interested port, city, or community. The railways have so developed the commerce of the country, and its fields of production are tributary to so many ports, that no rate could be made to any one of them which would not affect many or all of the others, and

give them the basis of a claim that a preference had been made against them. The products of the United States find their way to foreign lands by way of the Atlantic, the Pacific, or the Gulf ports, and all these ports are in a direct sense competitive with each other. The Atlantic, the Pacific, and the Gulf groups of ports have railway systems leading to them, and competing not only with each other but with the roads leading to each of the other groups. The question now before us is, therefore, whether the country shall surrender the competition based on the laws of trade and commerce, and the efforts of competitive agencies, and take in their place a rigid and inflexible system of rates determined by distance, subject to the limitations of the Constitution.

In conclusion, let me say that the making of rates by the Interstate Commerce Commission would result, in a great majority of cases, in a violation of the Constitution; it would encourage and promote litigation and sectional discord; it would work gross inequalities, and would inevitably break down any body of men who undertook such an impossible task. The business men of this great city, so largely represented here to-night, can not afford to commit their commercial destiny to the dangers of an untried economic experiment.









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